

**TAN KENG HONG & ANOR. v.
FATIMAH BINTI ABDULLAH & ORS.**

[F.C. (Suffian C.J., Gill and Ong Hock Sini F.JJ.)
March 2, 1974]

[Kuala Lumpur — Federal Court Civil Appeal
No. 136 of 1973]

Insurance — Motor Insurance — Policy excepting liability for death of person carried on vehicle, other than passenger carried by reason of or in pursuance of a contract of employment — Meaning of provisions in policy — When person carried by reason of contract of employment — Person taking a free lift — Insurers are not liable for death of such person.

In this case the question at issue was whether the insurers were liable to indemnify the appellants, the driver and owner of a lorry, against whom judgment for damages in negligence had been given. The lorry was insured by the insurers under a third-party policy which excepted liability for death caused to any person carried on the vehicle (other than a passenger carried by reason of or in pursuance of a contract of employment). The deceased who was killed when the lorry overturned had obtained a free lift on the lorry to Seremban. In the High Court it was held that the insurers were not liable and the appellants appealed.

Held, dismissing the appeal: as it appeared in this case that the deceased was getting a free lift on the lorry, the learned trial judge was right in holding that the insurers were not liable under the policy to indemnify the appellants.

Cases referred to:-

- (1) *Izzard v. Universal Insurance Co. Ltd.* [1937] A.C. 773.
- (2) *Baker v. Provident Accident & White Cross Insurance Co. Ltd.* [1939] 2 All E.R. 690.

FEDERAL COURT.

Atma Singh Gill for the appellants.

N. Ramachandran for the first respondents.

V. C. George for the insurers, the second respondents.

Suffian C.J. (delivering judgment of the Court): On 1st June, 1963, Ibrahim bin Kimpal was riding on a lorry, being driven by Tan Keng Hong, the first defendant employed by Yoong Leok Kee Corporation Ltd. (the second defendant) along the Kuala Pilah-Seremban Road. Going down a slope at the bottom of which was a bend, the lorry loaded with timber overturned because of brake failure and as a result Ibrahim was killed. The administrators of his estate (plaintiffs) won judgment for damages in negligence against the two defendants, but the learned trial judge held that the insurers of the lorry, the New India Assurance Company Ltd. who had been made a third party, were not liable to indemnify the defendants, who would therefore have to pay damages out of their own pocket.

The defendants appeal to us.

During the course of the arguments for reasons stated then, we indicated to counsel that we dismissed the appeal against liability and against quantum.

It now remains for us to deal with the question whether or not the insurers are liable to indemnify the defendants.

The policy provides by section II that—

"The company [third party] will subject to the limits of liability indemnify the insured [the second defendant and his servant the first defendant] in the event of accident caused by or arising out of the use of the motor vehicle ... which the insured shall become legally liable to pay in respect of ... death to any person."

A Then "Exceptions to Section II" mention eight exceptions to the above undertaking by the insurers, two of which are material. The material parts are exceptions (ii) and (iii) which read:

"The company shall not be liable in respect of —

- (ii) death of ... any person in the employment of the insured arising out of and in the course of such employment;
- B** (iii) death of ... any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon ... the motor vehicle at the time of the occurrence of the event out of which any claim arises."

We are concerned mainly with the words italicized.

C On the authority of *Izzard v. Universal Insurance Co. Ltd.*,⁽¹⁾ a House of Lords decision, which we respectfully follow, it is clear that the above provisions of the policy mean this, that —

- (1) the insurers will indemnify the second defendant and his servant against third party risks, but this is subject to the limits of liability stated in the policy;
- D** (2) in accordance with the limits of liability stated in the policy:
 - (a) the insurers will not be liable to indemnify the defendants in respect of third party claims from persons in the employment of the second defendant whose death arose out of and in the course of that employment; and
 - E** (b) the insurers will not be liable in respect of death of any person being carried in the lorry at the time of the accident;
- (3) but — and this is an important qualification — the insurers will be liable to indemnify the defendants in respect of the death of any passenger carried on the lorry by reason of or in pursuance of a contract of employment. This is clear from the words italicized in exception (iii) to section II.

F In this case, the contract of employment cannot mean contract of employment with the second defendant, because exception (ii) clearly excludes the insurers from liability in respect of death of any person in the employment of the second defendant arising out of and in the course of such employment. So it is clear that the words in italics can only mean that the insurers will be liable to indemnify the defendants in respect of the death of a passenger not employed by the second defendant and carried by reason of or in pursuance of a contract of employment.

H From the above it is clear that the insurers are liable to indemnify the defendants if Ibrahim bin Kimpal was a passenger carried on the lorry by reason of or in pursuance of a contract of employment between him and his employer not being the second defendant.

I On the authority of *Baker v. Provident Accident and White Cross Insurance Co. Ltd.*,⁽²⁾ a decision of Cassels J., we hold that a person is carried "by reason of" a contract of employment if, for instance, he is directed by his employer to travel in a vehicle, and the employer is able to give that direction because of the relationship of employer and employee; and that a person is carried "in pursuance of" a contract of employment if it is a term of the contract that he shall be carried.

The question then arises: what was the status of the deceased when he was riding on the lorry?

The second defendant had a timber concession in the jungle at Bukit Tinggi and 32 miles away in Seremban they had a sawmill. On the day of the accident their driver (the first defendant) drove the company lorry to the concession area, leaving at about noon and arriving at the area at about 2 p.m. He loaded up with timber and then left the area. Soon afterwards he arrived at the Government forest checking station in Kuala Pilah about 10 or 12 miles away where the timber was checked by the Forestry Department. He left the station and, on arriving near the Rex Theatre about a quarter of a mile away, the deceased (a forester working for the Forestry Department) stopped the lorry, asked for and was given a lift to Seremban. It is not unusual for timber lorries to give lifts to Forestry Department employees who wish to visit logging areas in the jungle and who wish to go to town. It was while they were on the way to Seremban that the lorry overturned and killed the deceased. The deceased's job included the inspection of forest areas and the inspection of sawmills. He supervised the concession belonging to the company. A forester may also have to inspect timber lorries at checking stations or on the way to sawmills to see whether royalty had been paid on logs being carried. But there was no evidence that the deceased was on duty when he boarded the lorry. On the evidence the learned trial judge's finding was that the deceased was merely getting a free lift.

There was no evidence that it was a term of the contract of employment between the deceased and the Forestry Department that he shall be carried in the second defendant's lorry, so it cannot be said that at the time of the accident he was being carried on the lorry "in pursuance of" a contract of employment between him and his employers, the Forestry Department.

There was evidence as stated that his employers, the Forestry Department, could have directed the deceased to travel in the lorry as part of his official duty to check timber on the lorry and the department would have been able to give that direction because of the relationship of employer and employee, but there was no evidence that the deceased was on the lorry on the fatal day on official duty, and in the face of the learned trial judge's positive finding that the deceased was then getting merely a free lift to Seremban, we are respectfully of the opinion that the learned judge was right in holding that the insurers are not liable under the policy to indemnify the defendants.

We would therefore dismiss this appeal with costs. Appellants' deposit to respondents against taxed costs.

Appeal dismissed.

Solicitors: *Atma Singh Gill & Co.; N. Ramachandran & Co.; Ng Ek Teong & Partners.*

A THE CHARTERED BANK v. YONG CHAN

[F.C. (Azmi L.P., Ong Hock Sim and Raja Azlan Shah F.JJ.)
March 11, 1974]

[Kota Kinabalu — Federal Court Civil Appeal
No. 90 of 1973]

Practice and Procedure — Wrongful dishonour of cheque — Action founded on libel — Pleadings — Endorsement of claim — Limitation — Limitation Ordinance (Sabah Cap. 72).

Banking — Wrongful dishonour of cheque — Action for balance of contract — Account in name of partnership — Whether one partner can sue for breach of contract — Sabah Partnership Ordinance, 1961, s. 40.

The respondent had drawn a cheque on the partnership account with the appellant bank. The partnership had been dissolved and under the terms of dissolution the respondent was given authority to wind-up the partnership business and he continued to operate the partnership account. Subsequently, one of the former partners wrote to the bank asking the bank to stop withdrawals unless authorised by all three partners. When notified of this letter, the respondent objected to it. Subsequently, the respondent issued a cheque which was returned dishonoured with the answer "signature of all partners required". More than two years later the respondent issued a writ and on the pleadings based his claim on libel. The learned trial judge held that the action based on libel was statute-barred by virtue of the Sabah Limitation Ordinance. He, however, awarded a sum of \$1,000 by way of damages for breach of contract. The appellants appealed.

Held, allowing the appeal: (1) the learned judge was clearly wrong when he concluded that the pleadings included a claim for breach of contract as well as a claim for libel;

(2) as the trial judge had decided on an issue not raised on the pleadings, the judgment must be set aside and a new trial ordered.

Observations on the right of a partner to sue for breach of contract with partnership.

Per Raja Azlan Shah F.J.: "A wrongful dishonour of a cheque gives rise to two possible causes of action, one for breach of contract and the other in tort, and in a proper case the practice has been to combine the two claims in one action; rules of pleadings determine how those claims may be so combined."

Obiter: The agreement (in this case) was not merely one that the bank should receive and hold money in joint account which is a joint contract, but also an agreement with each partner that it would honour cheques drawn by him individually unless there is written notice to the contrary which entails obligations to each of them severally. In the circumstances it is not possible to accept as an unqualified proposition the contention advanced in this appeal on behalf of the bank that in an action for breach of contract made with several persons jointly, they should all join in such action.

Cases referred to:-

- (1) *Esso Petroleum Co. Ltd. v. Southport Corporation* [1956] A.C. 218, 238.
- (2) *Tan Ah Sam v. Chartered Bank* [1971] 1 M.L.J. 28.
- (3) *Haji Mohamad Dom v. Sakiman* [1956] M.L.J. 45.
- (4) *Khiaw Aik Heng Co. Ltd. v. Tan Tien Choy* [1964] M.L.J. 99.
- (5) *Twibell v. London Suburban Bank* [1869] W.N. 127.
- (6) *Arden v. Bank of New South Wales* [1956] V.L.R. 569.

FEDERAL COURT.

Peter Mooney for the appellant.

Shelley Yap Yeok Siew for the respondent.

Raja Azlan Shah F.J.: This appeal raises points of intricacy and commercial importance. The action was in respect of a claim for damages based on a wrongful dishonour of a cheque drawn by the respondent on the partnership account with the appellant